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STATUTORY PROHIBITION OF DRIVING WHILE INTOXICATED

I

STATUTES making driving while intoxicated an offense are of comparatively recent origin.¹ Most of them appeared within the last twenty years, as the use of the automobile increased.² These statutes had their genesis in two existent difficulties. One was the difficulty of convicting an intoxicated driver under the common law. The only applicable common-law offense was that of a public nuisance. An important element of that offense was "annoyance or injury to the community".³ This element was a serious limitation in fostering public safety. A man might be driving a car while he was thoroughly inebriated, but if he did not run someone down or annoy the community to the extent of being a public nuisance, no offense was committed. The common-law offense failed to take into account the fact that unless some effective punishment and deterrent was meted out to such a drunken driver when no injury was done, he would be more likely to injure someone in the future.⁴ One of the primary purposes of the newer statutes was to cure this limitation.

The other difficulty which the more modern statutes tried to cure, was that of convicting an intoxicated driver under

¹ The within study of these statutes and the differences in their enforcement was made at the instance of Mayor Fiorello H. LaGuardia, in his drive to mitigate the evils of drunken driving. I am also indebted to Paul Windels, Esq., Corporation Counsel of the City of New York, and Oscar S. Cox, Esq., Chief of the Tax Division in the Corporation Counsel's office. Chief Magistrate Schurman was instrumental in distributing this study to all city magistrates, as part of the attack on this evil in New York. See also, note 68, *infra*.

² Some indication of the seriousness of the problem appears from a report made by Dr. Theron W. Kilmer to the International Association of Police and Fire Surgeons, N. Y. Herald Tribune, Nov. 24, 1935. The number of drunken drivers in 1934 in New York State increased forty-nine times as fast as the number of newly licensed drivers. Although there were only 1 3/10 per cent more cars in the state for 1934, there were 69% more drunken motorists. Every one of thirty states investigated, with the exception of the District of Columbia, showed an increase in the number of intoxicated drivers.

³ See *State v. Rodgers*, 91 N. J. L. 212, 215, 102 Atl. 433, 435 (1917).

⁴ *Gault v. State*, 274 Pac. 687, 688 (Okla. 1929).

the older statutes aimed at "intoxication in a public place." Under these older statutes, it was generally held that one of the elements of the offense was that the intoxication be open and perceptible to the public.⁵ This, too, was a serious limitation in effectively safeguarding the public. It was a limitation based on outworn and disproved knowledge. To modern physiology, it is well known that a person's reaction time may be sufficiently slowed up and his motor control and coordination so affected by drinking that it will increase the probability of his running someone down. These effects on reaction time, motor control and coordination may take place without being "perceptible to the public." What is important from the standpoint of protecting the public safety is not whether a driver looks drunk, but whether his drinking has affected his motor control and coordination to the extent of making it more likely that he will cause injury. The older statutes failed to meet this condition. The modern statutes attempted to cure this limitation requiring proof of perceptible intoxication, as well as the limitation requiring proof of "injury to the community", by creating an offense which consisted merely of driving "while under the influence of intoxicating liquors," or "while in an intoxicated condition." The New York statute provides that:⁶

"Whoever operates a motor vehicle or motor cycle while in an intoxicated condition shall be guilty of a misdemeanor."

II

In the enforcement of the New York statute, some of the courts of this state appear to have forgotten or disregarded its purposes. While they oftentimes give lip service to the intention and purpose of the statute, in actual practice

⁵ See N. Y. PENAL CODE § 1221, "Intoxication in a Public Place", N. Y. Laws 1911, successor to N. Y. Laws 1896, c. 112, § 40, first passed by N. Y. Laws 1857, c. 628, § 17, and included in N. Y. REVISED STATUTES (5th ed.) pt. 1, c. XX, tit. 9, as § 18.

⁶ N. Y. VEHICLE & TRAFFIC LAW § 70 (5), first added as § 290 (3) of N. Y. HIGHWAY LAW by N. Y. Laws 1910, c. 374.

they require proof of either or both injury to the community, or perceptible intoxication.⁷

Typical of the erroneous practice of requiring "injury to the community" under our present statute is a recent decision, *People v. Ole Jensen*.⁸ The opinion in this case reads, in part, as follows:

"The defendant appeals from a judgment convicting him, as a first offender, of the crime of driving an automobile while intoxicated and sentencing him to a term of thirty days in the County Jail * * *.

"*As there was no accident and no property damage*, the question here is whether this defendant belongs at home with his family or in jail with felons. The answer seems so obvious that no one unbitten by the asp of fanaticism should hesitate. Liberty may be restored to the defendant, but the stigma of six days behind bars for an act *involving no moral wrong and no injury to any human being will linger long* * * *.

"A man who commits his first offense of driving an automobile while in an intoxicated condition may be a fool, but he is not a felon in the estimation of the generality of mankind. The extent of his foolhardiness depends upon the man himself. Some become better drivers, just as they become better men, under moderate stimulation. Every intelligent person knows that many of the greatest works of art and of literature and countless oratorical gems of the past were vastly aided, if not inspired, by some such agency. * * *.

"*Judgment of conviction reversed and defendant discharged.*" (Italics ours.)⁹

It is difficult to list all the amazing errors in this opinion. Admittedly, the defendant was guilty of driving while in an intoxicated condition—the offense described in this statute. But, the court reads into the statute the additional requirement, patently *not* there, that the defendant must have in-

⁷ See State Dept. Reports, Vol. 45, p. 604, at 606.

⁸ 142 Misc. 340, 255 N. Y. Supp. 337 (1931).

⁹ Similarly held in *Peo. v. Betts*, 142 Misc. 240, 254 N. Y. Supp. 786 (1931).

jured someone.¹⁰ While this question might be entirely relevant to the matter of mitigating punishment or suspending sentence, there was no possible legal basis for the court's disregard of the plain mandate of the statute, in reversing the conviction.

In addition, the opinion makes reference to two additional factors which seem frequently to enter into the decisions in this state, although one is irrelevant, and the other erroneous. The courts often refer to the fact that the defendant's act "involved no moral wrong." The question involved, is not whether it is right for a man to take a drink, or two or three—that is beside the point—but whether it is safe for that man to drive an automobile. The people have said through their legislators that, irrespective of whether an accident actually happens or not, any one who drives a car "while in an intoxicated condition" commits a misdemeanor. Some of our lower courts apparently read that legislation out of the books when they demand, in addition, actual injury to person or property and/or perceptible signs of intoxication—especially since all physicians, and most courts in other states, recognize that absence of such perceptible signs is not conclusive evidence against the existence of an intoxicated condition.

The additional error expressed in the foregoing opinion, is the belief that liquor, before excess, may provide "moderate stimulation" which will make a man a "better driver," as well as a better painter or orator. This is an error shared by many. Liquor may stimulate the flow of words and pictures, but it is well established by scientific tests that it interferes with motor control and coordination, and therefore

¹⁰ Louisiana emphasizes the fact that the usual drunken driving statutes do not require an injury, by providing in a different statute, with a heavier penalty than usual (GEN. STATS. §§ 5292, 5293) as follows:

"Section 5292. *Operating motor vehicle while intoxicated and causing injury.* It shall be unlawful for any person in an intoxicated condition and operating a motor vehicle of any nature whatsoever, to cause injury to person or property of another.

"Section 5293. *Penalty.* Any person found guilty of the violation of the provisions of this Act may be imprisoned with or without hard labor, for a term of not more than one year and fined in a sum not exceeding one thousand dollars (\$1,000.00)."

Similarly, CAL. PENAL CODE § 367e.

increases the probability of accidents. An editorial in the *New York Sun*, of June 25th, 1935, gives some of the figures which show the astonishing loss of efficiency as a driver, resulting from the consumption of even small amounts of intoxicating liquor.¹¹

"In an article in the *Atlantic Monthly*, Curtis Billings reported results of numerous scientific tests which convinced him that drivers 'who have merely been drinking as distinguished from the few who are patently drunk,' present the 'real menace' to safety on the highway. *Various experiments indicated that men who had consumed an ounce and a half of alcohol made 59.7 per cent. more errors than an equal number who had no alcohol.* The drinkers were 9.7 per cent. slower in their mental reaction to selective speeds, 17.4 per cent. slower in muscular reaction, 35.3 per cent. poorer in continuous concentration. A test devised to measure the time elapsed between getting a signal and pressing a brake pedal showed that the average was 37 per cent. longer for the drinkers than for the non-drinkers. * * *.

"A pamphlet recently issued by General Motors reports that at only 20 miles an hour the average driver goes 22 feet before he can even start to use his brakes; that it takes another 18 in which to stop completely. Any quantity of alcohol which slows up his normal mental processes might conceivably contribute to a disaster which otherwise would be avoided. * * *.

"Any driver whose reflexes are below par, whose judgment of pace and distance is clouded, is unsafe at the wheel, a menace to every other driver on the road, to say nothing of himself and the occupants of his own car."

III

The various statutes establishing the offense of driving while intoxicated may be grouped under four or five well defined types.

¹¹ Reprinted N. Y. L. J., July 11, 1935, p. 108, "Drunken Drivers".

Theoretically, the most inclusive type is that of *Texas*¹² and *Maine*.¹³ The Texas statute makes it a penal offense for a person to drive "while such person is intoxicated, or in any degree under the influence of intoxicating liquors"; the Maine statute saying "when [the person is] intoxicated, or at all under the influence of intoxicating liquor."

The next most inclusive is the form of statute which forbids operation "while intoxicated, or under the influence of intoxicating liquors," as in *Oregon*,¹⁴ *North Carolina*,¹⁵ and *Tennessee*.¹⁶

The next most inclusive, and the most frequent form is the one forbidding operation of a car "*while under the influence of intoxicating liquors*." *Massachusetts*,¹⁷ *Connecticut*,¹⁸ *New Jersey*,¹⁹ *Georgia*,²⁰ *Pennsylvania*,²¹ *Minnesota*,²² *Oklahoma*,²³ *Arizona*,²⁴ *California*,²⁵ and *Wisconsin*,²⁶ are among the many states which have adopted this form.

The fourth type is that of *New York State*, where it is a misdemeanor for a person to drive a car "*while in an intoxicated condition*."²⁷ *Iowa*²⁸ and *Missouri*²⁹ use the same language in their statutes.

Finally, there are those states which prohibit driving merely "when intoxicated," as in *North Carolina*,³⁰ or, "while drunk or intoxicated" as in *Illinois*.³¹

¹² TEXAS PENAL CODE art. 802.

¹³ MAINE MOTOR VEHICLE LAW c. 29, § 88.

¹⁴ ORE. CODE 1930, §§ 15-201.

¹⁵ N. C. CODE 1927, c. 82, Crimes and Punishments § 4506 (L. 1919, c. 234).
Ch. 55, art. 7, The Motor Vehicle Act § 2621 (44) (L. 1927, c. 148, § 2).

¹⁶ TENN. ACTS 1917, c. 21, § 1.

¹⁷ MASS. ANN. LAWS c. 90, § 24.

¹⁸ CONN. GEN. STAT. c. 82, tit. 112, § 1785.

¹⁹ N. J. LAWS 1931, c. 171, § 14 (3).

²⁰ GA. CODE (1933) § 68.

²¹ PA. VEHICLES LAW tit. 75, § 231.

²² MINN. LAWS 1927, c. 412, § 2.

²³ OKLA. LAWS 1923, § 3, Sen. Bill No. 25, c. 16.

²⁴ ARIZ. LAWS 4th Spec. Sess. 1927, c. 2 (6), par. 1.

²⁵ CAL. HIGHWAY LAW § 112.

²⁶ WIS. VEHICLE OPERATION ACT §§ 6362-5.

²⁷ N. Y. VEHICLE AND TRAFFIC LAW § 70 (5).

²⁸ IOWA CODE, Motor Vehicles, § 5027.

²⁹ MO. REV. STATS. § 7783.

³⁰ N. C. CODE 1927, c. 55, MOTOR VEHICLE art. 4, § 2614 (L. 1917, c. 140, § 13) superseded by sections set out in note 15, *supra*; see also ONTARIO, REV. STATS. 1927, § 45 (1), (2).

³¹ ILL. REV. STAT. (1931) c. 121, § 242.

Great Britain words its statute somewhat differently by prohibiting driving by a person "under the influence of drink * * * to such an extent as to be incapable of having proper control of the vehicle."³²

These slightly variant descriptions are, by some decisions, supposed to demand the existence of different degrees of intoxication to bring an offender within the statute.³³ Other decisions, however, say that they are to all practical purposes, the same.^{33a}

But the exact wording of the statutes is not the most significant factor in their enforcement. The interpretation of each statute depends very greatly upon the temper and attitude of the court. In practically all the states, as well as in Great Britain, the application of the statute to hold the defendant is more uniform and more exacting than in New York. It cannot be considered without significance that of the scores of cases examined in the other states of the Union dealing with these statutes, no matter how worded, all but two or three *affirmed* the convictions below, while of the three New York cases cited herein, under our similar statute, all three were reversals of convictions below.

The difference in the temper and attitude of the courts of other states as compared with ours is also readily apparent from decisions such as the following. In *State v. Rodgers*,³⁴ the New Jersey Court held as follows:

"It will be noticed that it is not essential to the existence of the statutory offense that the driver of the automobile should be so intoxicated that he cannot safely drive a car. The expression, 'under the influence of intoxicating liquor,' covers not only all the well known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors, and which tends to deprive

³² CHITTY, STATS., Road Traffic Act, 15 [1].

³³ Commonwealth v. Lyseth, 250 Mass. 555, 146 N. E. 18 (1925); see Wilson v. State, 59 S. W. (2d) 399 (Tex. 1933).

^{33a} See People v. Dingle, 205 Pac. 705, 708 (Cal. 1922); People v. Lewis, 37 P. (2d) 752, 753 (Cal. 1934); State v. Noble, 250 Pac. 833, 834 (Ore. 1926); Williams v. State, 271 S. W. 628, 629 (Tex. 1925).

³⁴ 91 N. J. L. 212, 215, 102 Atl. 433, 435 (1917).

him of that clearness of intellect and control of himself which he would otherwise possess. *So, one driving an automobile upon a public street while under the influence of intoxicating liquor offends against the Disorderly Persons Act, even though he drives so slowly and so skillfully and carefully that the public is not annoyed or endangered * * *.*"³⁵

A similar clear understanding, that the common-law requirement of actual or imminent injury to person or property is not necessary to make out the simple statutory offense, appears in the decision of *Commonwealth v. Lyseth*.³⁶

"BRALEY, J. The defendant having been tried and convicted on a complaint under G. L. c. 90, § 24, for operating an automobile while under the influence of intoxicating liquor, contends, that the trial judge erroneously refused to give the following request as framed: 'The defendant cannot be found guilty of driving while under the influence of intoxicating liquor unless the jury find that he was actually driving in a manner different from the way he would have driven had he taken no intoxicating liquor.' * * *.

"The Commonwealth was not required to prove that the defendant was drunk. 'Whatever difficulties there may be in framing * * * a definition of the extent of inebriety which falls short of and which constitutes drunkenness, there is a distinction between that crime on the one hand and merely being under the influence of liquor on the other hand, which is recognized in common speech, in ordinary experience, and in judicial decisions.' *Cutter v. Cooper*, 234 Mass. 307, 317, 318, 125 N. E. 634, 637. The statute is penal. Its very purpose is to regulate the use of motor vehicles on the public ways, in the interests of the public welfare. See *Tripp v. Allen*, 226 Mass. 189, 115 N. E.

³⁵ *Peo. v. McGrath*, 271 Pac. 549, 550 (Cal. 1928) (Court pointed out the offense could be committed even though there are no other travellers on the highway at the time.). See also, *Stewart v. State*, 299 S. W. 646, 647 (Tex. 1927).

³⁶ 250 Mass. 555, 146 N. E. 18 (1925).

255. *It was wholly immaterial whether the defendant exercised due care to avoid injury to other travelers, and he could be convicted even if there were no travelers on the street. Commonwealth v. Horsfall*, 213 Mass. 232, 235, 100 N. E. 362, Ann. Cas. 1914A, 682.

"We perceive no reason why the statute should not be construed in accordance with its plain meaning, and the entry must be

"Exceptions overruled." (Italics ours.)

In further support of the fact that the exact language of the statute seems not to be the controlling factor, is the decision in *Hasten v. State*,³⁷ where the court said:

"The second and third assignments of error go to the question of what extent of influence of liquor is required to justify a conviction under our statute.

"[2] It is appellant's claim that this means in effect 'under the influence of intoxicating liquor to the extent of impairing to an appreciable degree his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties and using reasonable care, would operate a similar vehicle under similar conditions.' It is the contention of the state, on the other hand, that the law means 'any influence of intoxicating liquor, however slight,' and the trial court instructed the jury on this latter theory. * * *.

"It is a truism that a person who is even to the *slightest extent* 'under the influence of liquor' in the common and well-understood acceptance of the term, is to some degree at least less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern automobile with safety to himself and the public. With the increasing number and speed of automobiles on our highways, and the appalling number of accidents resulting there-

³⁷ 280 Pac. 670 (Ariz. 1929). The Arizona statute reads "while under the influence of intoxicating liquors." Laws, 4th Spec. Sess. 1927, c. 2 (6), par. 1.

from, it is not strange that the lawmaking power determined that any person, who of his own free will voluntarily lessened *in the slightest degree* his ability to handle such vehicles by the use of intoxicating liquor, should, while in such condition, be debarred from their use. The Legislature has placed no limitation on the extent of the influence required, nor can we add to their language. * * *.

"The judgment of the trial court is affirmed."

Iowa has a statute similar to that of New York ("while in an intoxicated condition").³⁸ The case of *State v. Giles*,³⁹ shows the difference in the attitude toward enforcement of the same statute:

"Two grounds for reversal are presented: (1) That the conviction is not sustained by the evidence; (2) that the punishment was excessive.

"We cannot say that the evidence was insufficient to sustain the conviction. Whether the evidence was such as to justify the maximum sentence is a question not free from perplexity. The very nature of the offense in its most mitigated form involves so much of danger to human life as to call for severe punishment. * * * He (the defendant) was driving at the rate of from 20 to 35 miles an hour, and passed three cars as he approached the toll-house. The street in that vicinity was congested with traffic. *The defendant had sufficient control of his car to avoid all contact with other vehicles. There was no accident of any kind. The degree of his intoxication is much in dispute in the evidence.* The man in charge of the filling station saw no signs of intoxication upon him. Bankenship, who rode with him saw none. Another witness who talked with him saw none. He had no liquor upon his person, or in his car, though witnesses testified that they could smell intoxicating liquor upon his breath.

³⁸ IOWA CODE, Motor Vehicles § 5027; N. Y. VEHICLE & TRAFFIC LAW § 70 (5).

³⁹ 206 N. W. 133 (Iowa 1925).

"[1, 2] Granting, therefore, that the circumstances attending his particular offense were not aggravating in the sense in which the term is used in relation to public offenses, yet the fact remains that the nature of the offense itself is such that aggravation inheres in it. The peril threatened by such an offense is so great and so imminent that only severe punishment can be deemed adequate to restrain it. * * *.

"The judgment is accordingly affirmed." (Italics ours.)

The comparison of this decision, with the decision on practically identical facts, in the New York case of *Peo. v. Jensen*,⁴⁰ discussed *supra*, throws into relief the differences in application of these same statutes.

It should be noted that the group of cases here discussed, which define intoxication, beginning with *State v. Rodgers*, *supra*, through *People v. Dingle*, *infra*, are all leading cases, which have been continuously cited, not only in their respective states, but all over the country.

In *People v. Dingle*,⁴¹ the court held as follows:

"Complaint is made of the following instruction:
* * *. 'The court instructs you that under this section it is not necessary that the person should be so-called "dead-drunk" or hopelessly intoxicated, but if you shall be convinced, beyond a reasonable doubt, from the evidence in the case, that the defendant, was in such a condition from the use of intoxicating liquors that it so affected his acts or conduct, or movements, that the public or persons coming in contact with him could readily see and know that it was affecting him in this respect, and was reflected in his walk, acts, and conversation, and, if you shall find from the evidence in the case, beyond a reasonable doubt, that these conditions resulted from the use of intoxicating liquors and that the defendant was operating a motor vehicle upon a public highway in the county of Orange, when

⁴⁰ 142 Misc. 340, 255 N. Y. Supp. 337 (1931).

⁴¹ 205 Pac. 705, 708 (Cal. 1922).

in such condition, then the defendant was under the influence of intoxicating liquor within the meaning of the statute and you should find him guilty as charged.' * * *.

"* * * the instruction was, if anything, too favorable to defendant. A person may be so far under the influence of intoxicating liquor that, to an appreciable degree, there is an impairment of his ability to operate his automobile in the manner that an ordinarily prudent and cautious person, in the full possession of his faculties, would operate a similar vehicle under like conditions; and yet the person whose ability to operate his car is thus impaired might not be so drunk that the public, or persons coming in contact with him, could 'readily' see and know that intoxicating liquor was affecting his acts or conduct and was being reflected in his walk and conversation. *The drink may have impaired his ability to drive his car properly by imparting to him a dash of dangerous recklessness, without in any wise manifesting itself in his speech, or in his walk, or be noticeable in his intellectual processes.* We find no prejudicial error in this instruction. * * *.

"The judgment is affirmed."

IV

We find here in the expression of the California courts "a dash of dangerous recklessness" used as a matter of legal analysis, a characterization which, interestingly enough, is strikingly similar to that made by Dr. Alexander O. Gettler⁴² as a matter of scientific analysis. Dr. Gettler has made exhaustive studies of the relation between the percentage of alcohol found in the brain and the intoxicated condition, or lack of it, in the subject. The following table presents that relationship between the alcoholic content of the brain and the physiologic effects:⁴³

⁴² Toxicologist of the City of New York.

⁴³ GETTLER AND TIBER, *THE ALCOHOLIC CONTENT OF THE HUMAN BRAIN (ITS RELATION TO INTOXICATION)* p. 6, reprinted from *The Archives of Pathology and Laboratory Medicine*, Feb., 1927, vol. 3, pp. 218-226.

"Table 3—Classification of Alcohol Cases

Classification Trace	Percentage of Alcohol in Brain	Physiologic Effect
	0.005-0.02	Normal
+	0.02 -0.10	Normal
++	0.10 -0.25	<i>Loss of sense of care; ag- gressive</i>
+++	0.25 -0.40	Loss of equilibrium; in- toxicated
++++	0.40 -0.60	Unbalanced; intoxicated"

(Italics ours.)

In a bulletin issued by the New York Academy of Medicine, entitled "A Study of the Alcoholic Content of Autopsy Material, and Its Bearing On the Cause of Death," Dr. Gettler, after setting out the foregoing table, continues as follows (pp. 723, 724):

"Now as to effect. With a trace of alcohol the person looks normal, walks around normally and acts normal. Therefore one plus cases look normal. Two plus cases do not look intoxicated. Some have, however, lost their sense of care. They are a little aggressive—the modern hooch especially makes one aggressive. In the three plus cases there was a loss of equilibrium (intoxication) and the four plus cases were in the same condition, only they were almost helpless. They were so badly affected that they could hardly walk. So by the amount of the alcohol in the brain we can now say that we have an index for telling whether a person is intoxicated or not.

"Against this many people bring forth the same question that is repeatedly asked of me in court, 'Well, doctor, isn't it a fact that I can give the same amount of alcohol to two people, and one may become intoxicated and the other not?'

"My answer to that is: We are not analyzing what the man gets to drink. We are not analyzing what the man has in his stomach. We are not analyz-

ing what the man has in his intestines. We are analyzing for the alcoholic contents of the brain.

"There is a difference between how much alcohol is in the brain, and how much did he drink, or how much is in his stomach. The amount in his stomach does not affect the brain. The alcohol in the intestines does not affect the brain. Once it gets to the brain, it has an effect and that effect is proportionate to the amount present."

Dr. Gettler continues, in his pamphlet, to say that the reason why less of the total amount of alcohol drunk, gets to the brain in habitues, than in abstainers, is that all the tissues and organs of habitues have acquired an oxidizing power, absent in abstainers, which burns up a good part of the alcohol before it gets to the brain, but once a certain quantity gets there, the effect is the same.⁴⁴

"It is true, however, that the same amount of alcohol consumed will affect different persons to a different degree. This, one must remember, is alcohol consumed, and not the quantity of alcohol present in the brain. In those who have a greater tolerance, the power to oxidize alcohol rapidly has been developed to a high degree. They can partake of much more alcohol and show less effect because they destroy it much more quickly. Because of this more rapid oxidation, much of the alcohol consumed is destroyed, and hence it does not accumulate in the brain. The alcohol present in the brain is not proportional to the amount consumed in different persons, because the processes of oxidation in the cells vary. The part of the alcohol, however, which escapes oxidation and hence accumulates in the brain has its effect, and it matters little as to what the alcoholic habits of the person have been."

Dr. Gettler also conducted experiments on the relation-

⁴⁴*Id.* at 8. See also GETTLER & FREIREICH, *The Nature of Alcohol Tolerance* in AMERICAN JOURNAL OF SURGERY (1935).

ship between the alcohol content of the brain and the alcohol content of the spinal fluid.⁴⁵ His pertinent conclusions are:

- (1) The alcohol content of the spinal fluid is always somewhat higher than that of the brain. There is, however, a definite and regular relation between the alcohol content of the brain and spinal fluid.
- (2) All cases having 0.265 per cent. or more of alcohol in the spinal fluid were intoxicated. This corroborates the findings of Gettler and Tiber that individuals with an alcohol content in the brain of over 0.25 per cent. were intoxicated.

Dr. Gettler believes that the two plus people (meaning those in whose brains there has accumulated from .10 to 0.25 per cent. of alcohol, or from 0.12 to 0.265 per cent. alcoholic content of the spinal fluid) although not what could be described as "drunk" or "intoxicated" like the three plus and the four plus, are certainly "under the influence of intoxicating liquor," or "in an intoxicated condition"; and are not in a fit condition to drive a car safely, even though there are no visible signs of intoxication.

The question is, how can that be determined? The rule in our courts is that witnesses may express their opinion as to the condition of intoxication or sobriety of the defendant, as well as describe all the circumstances which led them to form this conclusion.⁴⁶ It is difficult enough, however, even in the three plus case, to obtain conclusive proof by inspection of the defendant, when arrested, since the witnesses almost invariably differ. Those in the defendant's car usually swear that the defendant showed no signs of liquor drinking, as against the policeman's and bystanders' testimony that he did.⁴⁷ In the two plus stage, almost equally dangerous, and

⁴⁵ GETTLER & FREIREICH, *Determination of Alcoholic Intoxication During Life by Spinal Fluid Analysis* in XCII JOURNAL OF BIOLOGICAL CHEMISTRY (July, 1931).

⁴⁶ *People v. Eastwood*, 14 N. Y. 562 (1856); Pamphlet, "Intoxication, How Proved," by Magistrate Frederick B. House.

⁴⁷ *Stewart v. State*, 299 S. W. 646, 647 (Tex. 1927); *Nunn v. State*, (1929, Ct. Crim. App. Tex.) 26 S. W. (2d) 648 (Tex. 1929).

scientifically determined to give no readily perceptible signs of imbibition, the problem becomes more acute.⁴⁸

The answer to the problem is not only a complete and immediate examination by a physician,⁴⁹ rather than trusting to the observation of laymen, but in addition, either a spinal fluid, blood or urine analysis, to show actual content of these body fluids. Dr. Gettler's experiments have shown that the brain gives the most reliable results in tests for alcohol content, with the spinal fluid practically as good. The former can be made, however, only on a dead patient; the latter, although it can be applied to the living by a spinal tap, may leave the subject temporarily incapacitated. For the present, therefore, the brain and spinal fluid tests seem impractical in drunken driving cases.

The remaining possibilities are, therefore, either to test the blood or the urine. Both tests have their staunch supporters. Although Dr. Gettler does not believe that either is as accurate as the brain or spinal fluid analysis, both methods are in actual use at the present time, and apparently are proving reasonably satisfactory. The blood test is being used in Europe, in cities like Oslo, Hamburg and Berlin.⁵⁰

⁴⁸ *People v. McIntire*, 292 Pac. 675, 677 (Cal. 1930); *State v. Johnson*, 287 Pac. 909, 911 (Utah 1930). In both of these cases, where the defendants ran over and killed their victims, it was held that the evidence of drinking was insufficient, since there were no perceptible signs of the "influence". However, it is only where these signs become gross, that there can be little difference of opinion, as in *People v. Fellows*, 34 P. (2d) 177 (Cal. 1934), where conviction was had. The court pointed out, at 178, that "from the time he alighted from his car to his incarceration, a period of more than two hours, he could not stand or walk without staggering; that his speech was thickened to such a degree that he could not articulate clearly."

⁴⁹ A police surgeon, as now arranged in New York City, makes an examination. The former "Examination of Prisoner charged with driving while Intoxicated" by the police, is almost pitifully inadequate. The blanks on the report, entitled as above, provide, among others, for answers to these questions. "Is he able to stand without aid," "Is he able to stoop without staggering," "Staggering gait on walking straight line," "Any other unusual condition," "Speech," "Thickened and slurred," "Loud and boisterous," "Blasphemous or abusive," etc. All of these are tests for the drunken man, not for the slightly intoxicated one, who is the more dangerous, because more likely to be at a wheel than the visibly drunken one. Note the descriptive language of Magistrate Sweeney, in convicting four out of six drunken drivers, N. Y. Sun, March 13, 1936. "A man too drunk to stand is not likely to be at the wheel of an automobile. It is the fellow whose ego and aggressiveness are accentuated who is causing all the trouble. Certainly when you go bumping into police cars it is an indication of accentuated ego."

⁵⁰ Editorial, "Blood Will Tell," N. Y. Times, May 16, 1935.

The urine analysis is being used in England,⁵¹ and in Milwaukee by Dr. Herman A. Heise.⁵²

The urine analysis seems preferable to the blood test, because involving no possibility of infection, or objection on the part of the defendant to the puncturing of the skin.

It is true that the urine test may not be in every instance completely conclusive, on the score of the *degree* of intoxication. But, on the other hand, there is the following to recommend it. If the defendant is correct in his contention that he has not taken a single drink, but is ill or nervous—the usual claim—the urine test will conclusively demonstrate the truth or falsity of such a claim. If there is no alcohol content in this body fluid, he is telling the truth, and has been given the benefit of an impartial and scientific test which can serve completely to exonerate him.

On the other hand, if, as the prosecution claims, he has been imbibing, the urine test, based on the established figures of minimum percentages of alcohol present, above which some intoxication must be found to exist (*cf.* Dr. Gettler's table, similar ones have been worked out for the urine tests), is an important corroborative element, of very great value to confirm inspectionary evidence (alcoholic breath, uncertain gait, thick speech, *etc.*). It is of even greater value when the obvious and perceptible signs are not present, as in the earlier stages of an "intoxicated condition," the two plus of Dr. Gettler's table—the class described in the California decision, *People v. Dingle, supra*, as having acquired "a dash of dangerous recklessness."

A similar type of test, not conclusive but rather one of exclusion, is now being applied in the blood paternity tests of the recently passed Breitbart-Esquirol bills.⁵³ These tests will not show conclusively that a man *is* the father of a child, but they will show either (1) that he is of a different blood

⁵¹ "Tests of Drunkenness in Motor Accidents," Law Times, Jan. 8, 1928, Vol. 165, p. 84.

⁵² "Alcohol and Automobile Accidents," Paper read before the American Medical Association, June 13, 1934.

⁵³ N. Y. Laws 1935, cc. 196, 197, 198 as amended by N. Y. Laws 1936, cc. 439, 440. For a scholarly discussion of this law and its application, see *Matter of Swahn*, 158 Misc. 17, 285 N. Y. Supp. 234 (1936). Also, *Flippen v. Meinhold*, 156 Misc. 451, 282 N. Y. Supp. 444 (1935); *Matter of Lentz*, 247 App. Div. 31, 282 N. Y. Supp. 49 (2d Dept. 1935).

group, so that he *cannot* be the father, or (2) that he is of a related blood group, so that he *may* be the father.⁵⁴ The urine test here suggested for drunkenness can be at least as helpful as these blood paternity tests.

It is believed that the suggested urine analysis does not come within the prohibition of Article 1, Section 6 of the New York State Constitution, privileging against self-incrimination.⁵⁵ Fingerprinting, before conviction, is actually done every day in the week, and a decision holding it self-incriminatory has been disregarded.⁵⁶ Note, also, the examination for venereal infection, constantly availed of under Section 343-m *et seq.*, of the Public Health Law.⁵⁷

Also, the Court of Appeals has held that "a prisoner may be examined for marks and bruises, and then they may be proved upon his trial to establish his guilt" and that the constitutional privilege is against any compulsion to testify *orally*, or by *written words*, and not otherwise.⁵⁸ Nor is there any professional privilege involved in such examinations, which would prevent the physician from thereafter testifying.⁵⁹

V

The language of the leading case in New York is sufficiently broad to make possible convictions, just as in the other states, where the defendant's capacity to drive is impaired to any extent, nor does the intoxication have to be perceptible. One of the principal problems is to get our lower

⁵⁴ The amendment by N. Y. Laws 1936, cc. 439, 440 makes the result of the test admissible in evidence only if exclusion of parentage is shown. See editorial, N. J. L. J., Oct. 29, 1935, Vol. 94, p. 1542.

⁵⁵ See discussion, "Tests of Drunkenness in Motor Accidents," L. T., Jan. 8, 1928. Note, also, *People v. Decker*, 156 Misc. 156, 282 N. Y. Supp. 176 (1935), where the court evaded the question of a claimed infringement of rights under the New York Constitution, because of a physical examination for drunkenness, on the ground that the record did not show the fact of such an examination.

⁵⁶ N. Y. CODE CRIM. PROC. § 552a; *Peo. v. Hevern*, 127 Misc. 141, 215 N. Y. Supp. 412 (1926); see also *Peo. v. Dennis*, 132 Misc. 410, 413, 230 N. Y. Supp. 510, 515 (1928), *aff'd*, 225 App. Div. 785 (4th Dept. 1928).

⁵⁷ *Peo. v. Johnson*, 252 N. Y. 387, 391, 169 N. E. 619 (1930).

⁵⁸ *Peo. v. Von Wormer*, 175 N. Y. 188, 195, 67 N. E. 299, 301 (1903).

⁵⁹ *Peo. v. Austin*, 199 N. Y. 446, 452, 93 N. E. 57, 59 (1910).

courts to apply the standard suggested in this leading case of *People v. Weaver*,⁶⁰ as follows:

"So in the statute under which the defendant has been convicted, the meaning of the term clearly is that one shall not be affected by alcoholic beverage to such an extent as to impair his judgment or his ability to operate an automobile. We may adopt the rule suggested by the learned district attorney in his brief in this case as follows: 'Hence for the purposes of the statute under which defendant is convicted, he is intoxicated when he has imbibed enough liquor to render him incapable of giving that attention and care to the operation of his automobile *that a man of prudence and reasonable intelligence would give.*' The difficulty is that the learned judge did not limit the jury to that rule. It may be difficult to draw the line between sobriety and intoxication. Because of such difficulty it may generally be proper to permit the jury to draw that line, but we think the jury should at least have been instructed that intoxication within the meaning of this statute means such a condition as impairs to some extent, *however slight it may be*, the ability of a person to operate an automobile." (Italics ours.)⁶¹

⁶⁰ 188 App. Div. 395, 400, 177 N. Y. Supp. 71, 74 (3d Dept. 1919).

⁶¹ In *State v. Graham*, 222 N. W. 909, 911 (Minn. 1929), there is an illuminating discussion of the claim that the crime is too vaguely defined by the statutes to be constitutionally valid.

"The constitutionality and validity of the laws is questioned. It is urged that it is invalid because of uncertainty and because it in no manner defines or limits the term 'under the influence of intoxicating liquor' * * *.

"The act of 1927 * * * substituted the words 'under the influence of intoxicating liquor' in place of the words 'in an intoxicated condition.' The statute is a police regulation. The original appears to be section 21, c. 365, Laws of 1911, and, so far as appears, has stood unchallenged. The primary purpose of the law is to advance the safety of travel on public highways. The expression 'under the influence of intoxicating liquor' is in common, everyday use by the people. It is older than this law. When used in reference to the driver of a vehicle on the public highways, it appears to have a well-understood meaning. The trial court, in the case of *Elkin v. Buschner* (Pa.) 16 A. 102, in discussing the question as to when a man is intoxicated, used this language in instructing the jury: 'Whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated; although he can walk straight, although he

Certainly, the man who drives "with a dash of dangerous recklessness," as in the language of the California court, or with "a loss of sense of care, aggressiveness," as it is described in Dr. Gettler's medical study, is "incapable of giving that attention and care to the operation of his automobile that a man of *prudence and reasonable intelligence* would give."⁶² Both the California court and Dr. Gettler are agreed that at this stage (the two plus), although it shows in the body (brain) as between 0.10 to 0.25 per cent. of alcohol, there are no outward symptoms of intoxication visible to the eye. This seriously impairs the validity of the ancient and widespread myth, that some liquor, even if not a lot, may make a man "a better driver." The symptoms discovered by Dr. Gettler, as the result of hundreds of tests, which accrue from drinks long before any real drunkenness is present, is described by him as "the loss of sense of care, aggressiveness" (the same thing as the "buoyancy or elation perceptible only to himself and not discernible by another" of *People v. Weaver*,⁶³ or "the dash of dangerous recklessness" of *People v. Dingle*⁶⁴). Such immediate product of the first drinks—admittedly what most people take those drinks for—may be excellent preparation for going into battle, but it is certainly the opposite for sitting at the wheel of a car, since it converts that car from a vehicle into a weapon.⁶⁵ That is exactly what Section 70, subdivision 5, of the Vehicle and Traffic Law of this state aims to prevent.

VI

In support of the statement herein that although our law itself is practically the same as those in force in the rest

may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be at himself, so as to be excited from it, and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated."

The Elkin v. Buschner definition has also been widely used in the courts of many states.

⁶² *Peo. v. Weaver*, 188 App. Div. 395, 177 N. Y. Supp. 71 (3d Dept. 1919).

⁶³ *Id.* at 400, 177 N. Y. Supp. at 74.

⁶⁴ 205 Pac. 705, 708 (Cal. 1922).

⁶⁵ *Commonwealth v. Gorman*, 192 N. E. 618, 620 (Mass. 1934); *Trebeck v. Crondace*, 1 K. B. 158, 166 (1918).

of the country, yet it has not been applied as stringently to effectuate its purpose, are the following figures, which show the percentages of convictions, compared with arrests for drunken driving, in states other than ours. Figures obtained on a preliminary examination of statistics of conviction were as follows:⁶⁶

OFFENSE—DRIVING WHILE UNDER THE INFLUENCE
OF LIQUOR.

	Arrests	Convictions	Percentage of Convictions to Arrests
Connecticut			
1932	1316	792	60-1.5%
1933	1288	720	57%
1934	1565	896	57-1/4%
Massachusetts			
1933	584	429	73-1/4%
1934	976	745	75-1/3%
California			
1933	2237	1995	89-1/5%
1934	2880	2256	78-1/3%

The percentage of convictions to arrests, for the similar offense, in New York City, for the last three months of 1934, was 20%, and for the first four months of 1935, was 21%, although usually approximately 30%. It seems highly significant that three states, chosen at random, should show a percentage of conviction, of approximately between 60 and 90%, as compared with the New York percentage of 20 to 30%.

A more complete examination fully confirms this premise. *The figure for the percentage of convictions to arrests for the offense of driving while under the influence of liquor for all states, with the exception of Iowa, North Carolina, Ohio, Vermont and Wisconsin, is 69.2%.⁶⁷ It speaks for it-*

⁶⁶ CONNECTICUT MOTOR VEHICLE STATISTICS FOR 1932, 1933, 1934; ANNUAL REPORTS, 1933, 1934, Massachusetts, Commissioner of Public Safety; CALIFORNIA MOTOR VEHICLE STATISTICS, 1933, 1934.

⁶⁷ STATISTICS OF COURTS OF GENERAL CRIMINAL JURISDICTION IN SELECTED STATES, Department of Commerce, Bureau of The Census (1932). Iowa's percentage of conviction is 78.7%; North Carolina's, 60.8%; Ohio's, 68.6%; Vermont's, 82.9%; Wisconsin's, 81.4%.

self, in comparison to the figure for New York of 20% to 30%.⁶⁸

VII

SUMMARY AND RECOMMENDATIONS

The conditions which led to the passage of the statutes penalizing driving while intoxicated, were the difficulty in obtaining convictions for a public nuisance at common law, since an "annoyance or injury to the community" had to be shown and the equal difficulty of obtaining convictions under statutes penalizing "intoxication in a public place," since the intoxication had to be offensively perceptible.

Under statutes substantially similar all over the country, most of the other states have interpreted their statutes to accomplish their purpose, namely, to prevent one who is at all under the influence of liquor from driving a car, even if there does not actually result the injury which the situation invites, and even if the intoxication is not offensively perceptible, since both by scientific test and every-day human experience, there is a recognized impairment of driving ability before the perceptibly intoxicated stage.

The language of the leading case in this state, People v. Weaver,⁶⁹ is broad enough to make it possible for this state to apply the same standards as are applied in other states. Nevertheless, the usual percentage of convictions in our lower courts (20 to 30%), as compared with the percentage of convictions in other states (69.2%), is so low as to make it apparent that our courts are more reluctant to convict than are the courts of other states.

It may also be that the apparently greater insistence here, on the two unnecessary prerequisites of actual injury to someone or perceptible intoxication, often reflect the difficulties felt by our magistrates in deciding on the conflicting

⁶⁸ In confirmation of the premise here discussed, that our law is the same as in the rest of the country but needs stricter enforcement, is the announcement made recently by Chief Magistrate Schurman, that as a result of the campaign of enforcement, of which this study was a part, the percentage of convictions to arrests, for drunken driving in New York, has recently approached the average for the rest of the country. N. Y. Sun, Dec. 15, 1936.

⁶⁹ 188 App. Div. 395, 177 N. Y. Supp. 71 (3d Dept. 1919).

evidence presented to them. This opinion evidence is inconclusive enough, even when the defendant has reached the more obvious stages of intoxication; it is certainly hopelessly inadequate in the earlier stages. If that difficulty of proof could be resolved by some simple test, the situation could be very much clarified, since, as stated, the discussion in *People v. Weaver* is ample to include the non-perceptible stages, as well as the more obvious ones.

The urine analysis now used in England and in Milwaukee, while not completely conclusive in every instance, would be of very great value, since it would be completely exculpatory of a defendant who had had no liquor, and could be an important corroborative factor, completing and confirming the other evidence, in situations where the defendant had imbibed liquor. It is to be preferred to the blood or spinal fluid analysis since it can be more easily accomplished by police regulation and added to the police surgeons' examination, as now arranged for, and would not need the legislation that a blood or spinal fluid test might, since the latter involve an operation, although slight. The English have had little difficulty in persuading voluntary compliance with a urine test, after explanation of its purpose, and that its effect will be completely exculpatory if no liquor has been taken, as claimed.⁷⁰

It is, therefore, recommended:

1. That a urine analysis be made a part of every examination, as now arranged for by a police surgeon, of a defendant charged with driving while in an intoxicated condition; and that additional technicians be assigned to do this testing.

2. That magistrates be urged to apply the present statute more fairly and adequately, and in complete compliance with *People v. Weaver*.⁷¹ There is no basis in law for reading into the statute, requirements based (1) on common-law nuisance charges (actual injury to someone), or (2) on statu-

⁷⁰ "Tests of Drunkenness in Motor Accidents," L. T., Jan. 8, 1928, Vol. 165, p. 84.

⁷¹ 188 App. Div. 395, 177 N. Y. Supp. 71 (3d Dept. 1919).

tory charges of "intoxication in a public place" (perceptible drunkenness). Neither of these have any place in the simple requirements of our statute penalizing "driving while in an intoxicated condition." Decisions like those in *People v. Jensen*,⁷² and *People v. Betts*,⁷³ are not justified by the law.

3. That pleas of guilty to the charge of disorderly conduct, with its lesser penalties and no danger of loss of license, should not be accepted as an alternative to standing trial on the charge of driving "while in an intoxicated condition."

All the foregoing can be accomplished without any legislative changes, and should result in making a living statute out of what has been in the past practically a dead one.

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⁷² 142 Misc. 340, 255 N. Y. Supp. 337 (1931).

⁷³ 142 Misc. 240, 254 N. Y. Supp. 786 (1931).